

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Expedited Declaratory Ruling)	CG Docket No. 02-278
Filed by Anthem, Inc., Blue Cross Blue)	
Shield Association, WellCare Healthcare)	
Plans, Inc. and the American Association of)	
Healthcare Administrative Management)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	

COMMENTS OF SILVERLINK COMMUNICATIONS, LLC

Silverlink Communications, LLC (“Silverlink”) respectfully submits these comments in response to the *Public Notice* issued by the Federal Communications Commission’s (“FCC” or Commission) Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceeding.¹ The *Public Notice* seeks comment on a petition filed by Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, and the American Association of Healthcare Administrative Management (collectively, the “Petitioners”), which seeks confirmation that providing a telephone number to a “covered entity” or “business associate” constitutes “prior express consent” under the Telephone Consumer Protection Act (“TCPA”) for non-marketing calls made for treatment, payment, or healthcare operations purposes when the calls are allowed

¹ *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management*, Public Notice, CG Docket No. 02-278, DA 16-947 (CGB, rel. Aug. 19, 2016) (“*Public Notice*”).

under the Health Insurance Portability and Accountability Act (“HIPAA”).² The Petition also asks the FCC to confirm that the term “healthcare provider,” as used in the *2015 Omnibus TCPA Order*, includes “covered entities” and “business associates.”³ For the reasons discussed below, the FCC should grant both requests.

I. Background.

Silverlink is a leading provider of communications solutions for the healthcare industry. For over 14 years, our solutions have helped health plans, pharmacies, and other organizations engage with millions of consumers across the United States.⁴ Our mission is to encourage healthy behavior changes by empowering consumers to make informed, proactive decisions about their healthcare.⁵

² See *id.* at 1; Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc. and the American Association of Healthcare Administrative Management for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus TCPA Declaratory Ruling and Order, CG Docket No. 02-278 (filed July 28, 2016) (“Petition”). The terms “covered entity” and “business associates,” as used in the Petition and the *Public Notice*, are defined in HIPAA. See *Public Notice* at 1; Petition at 3, 17-20.

³ See *Public Notice* at 1; Petition at 4, 21-23; see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (“*2015 Omnibus TCPA Order*”).

⁴ See, e.g., Silverlink, About Us, <http://www.silverlink.com/about.html> (last visited Sept. 13, 2016).

⁵ See *id.* Silverlink previously participated in the TCPA docket to encourage the FCC to exempt from the TCPA’s telemarketing restrictions healthcare calls that were already highly regulated under HIPAA. See Comments of Silverlink, CG Docket No. 02-278 (filed May 21, 2010). The FCC exempted such calls from its consent, identification, time-of-day, and abandoned call rules in the *2012 TCPA Order*. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830 (2012) (“*2012 TCPA Order*”).

Silverlink uses its proprietary platform to drive patient engagement using the right combination of automated calls, live calls, text messages, e-mail, and direct mail.⁶ Since 2002, we have helped the healthcare industry execute more than 80,000 engagement programs.⁷

Healthcare entities and consumers alike consistently report high levels of satisfaction with Silverlink's services. These services have led to demonstrable improvements in patient engagement and health outcomes, as described in greater detail below.⁸

II. The Healthcare Industry's Use of Advanced Calling Technologies Advances the Public Interest.

The record in this proceeding demonstrates that telephone outreach to patients helps improve health outcomes. For example, the Petitioners explain that text messages have been found to be particularly effective in increasing patient adherence to prescribed treatment, such as vaccination appointments.⁹ Similarly, the Petitioners explain that telephone outreach has also been found to be extremely effective in reducing post-discharge hospital readmission rates.¹⁰ In one study, discharged patients who received telephone outreach were 40 percent less likely to return to the hospital for readmission.¹¹

Silverlink's experiences confirm this point. For example, we supported a medical center with an automated "nurse" intervention, which consisted of a weekly automated voice interaction with five questions about glucose readings and the patient's confidence in her ability to self-

⁶ *See id.*

⁷ *See, e.g., id.*

⁸ *See* Section II, *infra*.

⁹ *See* Petition at 5.

¹⁰ *See id.* at 9.

¹¹ *See id.*

adjust insulin levels. In only eight weeks, the number of patients who reported glucose readings that were “in range” rose from 47 percent to 70.4 percent. Confidence with self-adjustment also steadily rose throughout the program, rising from 7.57 in the first week to 8.55 in the tenth week. As another example, we found that individuals who received telephone outreach were three times as likely to participate in mammogram screenings. As yet another example, we found that low-income, relapsed smokers who received interactive voice response (“IVR”) screening and IVR intervention were more than 11 times as likely to re-enroll in a support program than those who received only the IVR screening.¹² The IVR intervention consisted of automated questions to identify and address barriers to re-enrollment in the support program and an offer to be transferred to the program to re-initiate treatment.¹³

Importantly, the use of advanced calling technologies to perform outreach to patients saves enormous amounts of time and money. The use of such technologies also allows outreach to patients to be easily tailored, modified, and audited. In many cases, outreach would not be possible without their use. Indeed, as the Petitioners point out, “critical outreach on a large scale simply cannot occur without these technologies.”¹⁴

III. Healthcare Outreach Should Include Calls to Cell Phones.

Every day, more Americans are “cutting the cord” and becoming wireless-only. Nearly 48 percent of American adults had only wireless service as of December 31, 2015, according to

¹² See Beatriz H. Carlini *et al.*, *Reaching out, inviting back: using Interactive voice response (IVR) technology to recycle relapsed smokers back to Quitline treatment – a randomized controlled trial*, BMC PUBLIC HEALTH 12:507 (2012), <http://bmcpublichealth.biomedcentral.com/articles/10.1186/1471-2458-12-507>.

¹³ See *id.*

¹⁴ See Petition at 6.

the Centers for Disease Control and Prevention (“CDC”).¹⁵ By comparison, 38 percent of American adults lived in wireless-only households only three years prior.¹⁶ It is critical for healthcare outreach to include calls to cell phones in order to operate as intended, especially when this trend shows no signs of abating.

Low-income individuals, minorities, and other populations that are already disadvantaged from a healthcare access standpoint are also disproportionately wireless-only.¹⁷ For example, adults living in poverty (64.3 percent) or near poverty (54 percent) are significantly more likely than higher income adults (45.7 percent) to live in a wireless-only household.¹⁸ Similarly, Hispanic adults (60.5 percent) are significantly more likely than non-Hispanic white adults (44 percent) to live in a wireless-only household.¹⁹

The FCC should not prevent these segments of the population from receiving the same telephone healthcare outreach as others, especially when the only other practical way for covered entities and business associates to deliver messages with protected health information (“PHI”) to

¹⁵ See Stephen J. Blumberg and Julian V. Luke, CDC, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2015* (May 2016), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201605.pdf> (“Wireless Substitution Report”).

¹⁶ See *id.* at 5.

¹⁷ See, e.g., HHS, *Action Plan to Reduce Racial and Ethnic Health Disparities* at 2 (2010), http://minorityhealth.hhs.gov/npa/files/plans/hhs/hhs_plan_complete.pdf (explaining, among other things, that “families and communities that have systematically experienced social and economic disadvantages face greater obstacles to optimal health”); Paul W. Newacheck *et al.*, *Children’s Access to Primary Care: Differences by Race, Income, and Insurance Status*, Am. Academy of Pediatrics (1996), <http://pediatrics.aappublications.org/content/97/1/26.short> (finding that “poor, minority, and uninsured children fared consistently worse” in obtaining access to healthcare).

¹⁸ *Wireless Substitution Report* at 2.

¹⁹ *Id.*

them is through traditional mail (which is often ignored).²⁰ However, this is precisely what the FCC's TCPA rules and guidance could do in many instances absent a grant of the Petition. For example, the *2015 Omnibus TCPA Order* has created considerable confusion in the healthcare community concerning issues such as when "prior express consent" exists, what equipment is an "automatic telephone dialing system," and who is a "healthcare provider" that can take advantage of the free-to-end-user exemption for healthcare calls and look to the FCC's prior clarification.²¹ Given the proliferation of TCPA lawsuits in recent years, many covered entities and business associates would sooner forego outreach to patients at wireless numbers than risk exposing themselves to liability (or the threat of liability) under the statute.²²

IV. Healthcare Communications Are Already Extensively Regulated Under HIPAA.

HIPAA already comprehensively regulates how covered entities and business associates may use consumers' information, including their telephone numbers. Indeed, as the FCC has recognized, HIPAA regulations "already safeguard consumer privacy" and "cover all communications regarding protected health information and all means of communication regarding such information."²³

²⁰ HIPAA permits only certain uses and disclosures of PHI. *See, e.g.*, Department of Health and Human Services ("HHS"), *Uses and Disclosures for Treatment, Payment, and Health Care Operations* (2003), <http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/disclosures-treatment-payment-health-care-operations/index.html> ("PHI Uses and Disclosures").

²¹ *See, e.g.*, Petition at 2-3, 21-22.

²² *See, e.g.*, Comments of United Healthcare Services, Inc., CG Docket No. 02-278, at 6-7 (filed Jan. 16, 2014) (explaining that the threat of liability can chill the delivery of informational, non-telemarketing calls). The same issue does not exist concerning outreach to patients at residential lines because "prior express consent" is not needed to use an automatic telephone dialing system or prerecorded voice to place such non-marketing calls. *See* 47 C.F.R. § 64.1200(a)(3).

²³ *2012 TCPA Order* ¶ 61.

These HIPAA regulations apply to all covered entities and their business associates and have been “carefully balanced to avoid creating unnecessary barriers to the delivery of health information.”²⁴ They also apply to any form of telephonic communication – including live non-autodialed, live autodialed, and prerecorded calls – and are in this regard broader than the TCPA or the FCC’s TCPA rules.²⁵ The FCC should not further restrict the ability of covered entities and their business associates to communicate with individuals about matters related to treatment, payment, or healthcare operations.

Moreover, the Department of Health and Human Services (“HHS”) actively enforces HIPAA and can address any problems that arise in this space.²⁶ Violations of HIPAA are subject to both penalties and criminal penalties, including possible imprisonment.²⁷ HHS has resolved more than 132,442 HIPAA complaints since 2003 and applied corrective measures in all cases where an investigation has indicated noncompliance by a covered entity or business associate.²⁸ For example, HHS settled 37 cases of alleged HIPAA violations for approximately \$40 million and made 578 referrals to the Department of Justice for criminal investigation.²⁹

²⁴ See *PHI Uses and Disclosures*.

²⁵ See, e.g., *2012 TCPA Order* ¶ 59 n.169.

²⁶ See, e.g., HHS, Health Information Privacy, HIPAA Enforcement, <http://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/> (last visited Sept. 14, 2016)

²⁷ *2012 TCPA Order* ¶ 61.

²⁸ See HHS, Health Information Privacy, Enforcement Highlights, <http://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/data/enforcement-highlights/index.html> (last visited Sept. 14, 2016).

²⁹ See *id.*

V. “Prior Express Consent” is Necessarily Broad in the Healthcare Space.

The Petitioners correctly point out that the healthcare ecosystem is unique in that it often requires a number of different types of entities to coordinate and manage the healthcare services provided to an individual.³⁰ For example, a patient’s visit to her primary care physician may lead to correspondence from her local pharmacy about a prescription, from a specialist about a referral, or from her health plan about benefits. These communications help improve the patient’s care, are desired by the patient, and are expected if the patient had provided her telephone number to her primary care physician or any other covered entity.

Because the healthcare ecosystem often requires such coordination among covered entities and their business associates, a patient’s provision of her telephone number should be considered to constitute “prior express consent” for these parties to contact her concerning the care and services for which the number was provided. If, at any point, these communications become inconsistent with the patient’s desires or expectations, she may provide “instructions to the contrary.”³¹

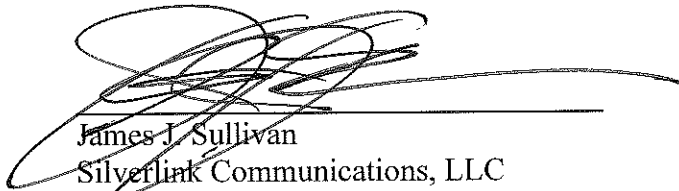
VI. Conclusion.

For the foregoing reasons, the FCC should grant the Petitioners’ requests and confirm that: (1) the provision of a number to a covered entity or business associate constitutes “prior express consent” under the TCPA to receive non-marketing calls for treatment, payment, or healthcare operations purposes when the calls are allowed under HIPAA; and (2) the term

³⁰ See Petition at 19.

³¹ See 2015 Omnibus TCPA Order ¶ 52.

“healthcare provider, as used in the FCC’s prior orders,” includes both covered entities and business associates.

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